COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ADJUSTMENT OF RATES OF GENERAL TELEPHONE COMPANY OF KENTUCKY	))	CASE NO. 8859

O R D E R

BACKGROUND

On August 29, 1983, the Commission issued a Supplemental Order of Procedure ("Supplemental Order") in the above-styled case which ordered that all requests for information and responses thereto be made a part of the record, unless otherwise ordered. The Supplemental Order also required inter alia objections to requests for information shall be filed with the Commission with 5 days of receipt thereof.

On September 8, 1983, General Telephone Company ("General") filed an Objection and Motion to Vacate or Amend Supplemental Order of Procedure. Aside from logistical reasons alleged as to why General could not comply with the terms of the Supplemental Order, General's main complaints involve the Commission's adoption of the 5-day objection rule without prior opportunity for comment and the ordering of responses to requests for information incorporated into the record without "benefit of proper introduction, any showing of relevance or materiality, an opportunity for

explanation or interpretation of the documents, the identification of the use intended to be made thereof, or the right to test such for probative value through cross examination."

On September 16, 1983, the Attorney General and Lexington-Fayette Urban County Government ("Lexington") filed a joint response to the General motion. The Attorney General and Lexington stated that all data requested in the rate case had probative value since it had a bearing on the central issue in the case: Whether or not the rate request is reasonable. Therefore, the Commission could properly consider all data supplied as admissible when filed. The Attorney General and Lexington further contended that General would have ample opportunity before, during and after the hearing to "test, explain or refute the relevance" of data submitted through cross-examination and post hearing briefs. Finally the Attorney General and Lexington disagreed with General that the Order of August 29, 1983, violated any of General's due process rights given the variety of means available to General to challenge the way in which the filed data is used. The Attorney General and Lexington urged the Commission to retain its order of August 29, 1983, and reject General's alternative proposals.

With respect to the 5-day objection rule, General proposes that objections to requests for information shall be filed within the time allowed for production thereof. As an alternative to the provision of the Supplemental Order incorporating all responses to requests for information into the record General proposes that the Commission, or any party, first file a formal

motion, 10 days prior to a scheduled hearing thereon, identifying documents intended to be included in the record, specifying the issue to which each pertains and the relevancy of each item to the stated issue. Objections to such a motion, with concisely stated grounds therefor, would be filed within 5 days.

In a cover letter from counsel, General stated that support for its motion is largely attributable to the recent Report on Due Process Issues to the Commission by Robert B. Schwemm ("Schwemm Report"). Recommendations 8, 9 and 10 from the Schwemm Report are relevant to the claims alleged by General in its Motion.

Recommendation 8 is that all data requests, including those from staff, be accompanied by a statement explaining why information is necessary and to what issue it relates. The Schwemm Report indicated a "short sentence" would suffice to implement the suggestion. The PSC had decided prior to the filing of General's motion to implement the recommendation in future cases, except for the initial staff data request. Thus, this policy will not apply to General's current rate case or to other utilities' cases which were in progress at the time the suggestion was adopted.

Recommendation 9 suggested the PSC adopt an expeditious discovery dispute resolution procedure. The Commission had decided prior to the filing of General's motion to continue to handle these disputes on an ad hoc basis, but determined that a time frame for objecting to requests would be included in the standard order of procedure. Hence, the Supplemental Order

entered August 29, 1983, specified that objections to requests for information be filed within 5 days following receipt.

Recommendation 10 is to establish a procedure to make all or a part of responses to data requests formally a part of the record. The Schwemm Report stated that the current PSC practice of including answers to data requests in the record automatically, does not violate "due process," but that a more formal system would be an improvement. The PSC had agreed to the recommendation and had directed the Secretary to include a procedure for including all or part of responses in the record prior to the filing of General's motion. Accordingly, the Supplemental Order entered August 29, 1983, specified that responses to requests for information would be made a part of the record unless the Commission ordered otherwise.

DISCUSSION

General's claims with regard to inclusion of data requests into the record without a prior demonstration of relevancy and materiality relate to requirements imposed by the Federal Rules of Evidence. However, K. C. Davis and other legal scholars view the Federal Rules of Evidence as being pertinent to jury trials, but not to non-jury trials or agency cases since they were not designed for that purpose.[1] Mr. Davis favors the following approach to the admissibility issue for agencies:

> Agency rules are seldom better than a simple implementation of §556(d) of the APA would be: "Any oral or documentary evidence may be received, but

[1] III K. C. Davis, Treatise on Administrative Law 225 (2nd ed. 1980).

> the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." A rule that says nothing but that irrelevant, immaterial, or unduly repetitious evidence is excluded can be entirely satisfactory.[2]

Whether or not an agency is covered under the APA, where agencies have adopted "relaxed" admissibility standards the agencies have been upheld.[3] The risk of committing reversible error is greater when strict standards are applied, as evidenced by the following excerpt from Builders Steel Co. v. Commissioner, cited in the Davis Treatise:

> In the trial of a non-jury case it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. ...On the other hand, a trial judge who, in the trial of a non-jury case, attempts to make strict rulings on the admissibility of evidence can easily get his decision reversed.[4]

The Builders Steel court also quoted with approval from a prior 8th Circuit case, Donnelly Garment Co.v. NLRB as follows:

> One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it accurately after it has been received, and, since he will base his findings upon the evidence which he regards as competent, material and convincing, he cannot be injured by the presence in the record of testimony which he does not consider competent or material.[5]

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[2] Id. at 235.

[3] IV Mezines, Stein & Gruff, Administrative Law., pp. 22-6 to 22-7. (1983).

[4] 179 F.2d 377, 379 (8th Cir. 1950).

[5] 123 F.2d 215, 113 (8th Cir. 1942).

Thus, the Commission's policy of including all data request responses in the record, with provision for the parties to object to responses which a party considers to be irrelevant or immaterial meets the test imposed by the courts.

The Commission being advised and having considered General's motion, the response filed by the Attorney General and Lexington, the Schwemm Report and applicable case law, ORDERS that General's motion be and it is hereby denied.

Done at Frankfort, Kentucky, this 18th day of October, 1983.

PUBLIC SERVICE COMMISSION

Chairman

Vice Chairman

Commissioner

ATTEST:

Secretary